No. 2505.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

CONSOLIDATED CONTRACT COMPANY, and PACIFIC COAST CASUALTY COMPANY,
Appellants,

vs.

HASSAM PAVING COMPANY, and OREGON HASSAM PAVING COMPANY,
Appellees.

APPELLEES' REPLY MEMORANDUM UPON APPELLANTS' PETITION FOR REHEARING

LOUIS W. SOUTHGATE,
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FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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The Petition for Rehearing should be denied if for no other reason than that:

I.

The points raised are not covered by any assignment of error.

II.

When the defendant, Pacific Coast Casualty Company, gave bond it was for the faithful performance by the defendant, Consolidated Contract Company, of a contract to lay Hassam pavement specified by name

(Record, Vol. I, p. 29) and the details of Hassam's patented process were specified by ordinance and made part of the contract (Record, Vol. I, pp. 19 to 23, 29, 33 and 34), all of which has been admitted by the defendants' surety company.

The Answer admits (Record, Vol. I, p. 59) the execution of the agreement and the execution of the bond by the defendant Surety Company, all as set out in the Amended Bill of Complaint.

As to the allegations in the Bill of infringement by the Surety Company, attention is called to pages 17, 36 and 37 of the Record. It is clear that in financially backing the Consolidated Contract Company the Pacific Coast Casualty Company aided and abetted the former in constructing the infringing pavement and profited by the infringement. The former could not do so without the latter's bond. The case is directly analogous to one where a party supplies another with funds that the latter may do certain specified infringing or otherwise unlawful acts. It is not so much the existence of the suretyship relation as it is the *entering into* that relation that so clearly aided and abetted the Consolidated Contract Company in infringing the patent of the appellees; in other words, the entirety of the acts of the two defendants made them infringers.

III.

It is an elementary law that all parties who aid or abet in the commission of a tort are individually, as well as jointly, liable. The infringement of a patent

is a tort. The defendants' surety company is in the situation of a contributory infringer.

> *Thomson-Houston Electric Co.* vs. *Ohio Brass Co.,* 80 Fed. 712.

Before Taft and Lurton, Circuit Judges, and Clark, D. J., Taft, J., says, p. 721: "An infringement of a patent is a tort analogous to trespass or trespass on the case. From the earliest times, all who take part in a tresspass, either by actual participation therein, or by aiding and abetting it, have been held to be jointly and severally liable for the injury inflicted. * * * If this healthful rule is not to apply to trespass upon patent property, then, indeed, the protection which is promised by the constitution and laws of the United States to inventors is a poor sham."

Townsend, District Judge, in *Thomson-Houston Electric Co.* vs. *Kelsey Electric Railway Specialty Co.,* 72 Fed. 1016 at 1017, says, in this connection:

> "Contributory infringement has been well defined as 'the intentional aiding of one person by another in the unlawful making or selling or using of the patened invention.' Howson, Contrib. Infringe. Pat., p. 1."

The same statement of the law is made verbatim by Sanborn, Circuit Judge, in *New York Scaffolding Co.* vs. *Whitney,* 224 Fed. 452 at 459, and is quoted by Mr. Justice Lurton in *Henry* vs. *A. B. Dick Co.* in 224 U. S. 1, at page 34,

That this rule of the general tort law applies to the tort of infringement is also recognized by the leading

text writers. For instance, Robinson on Patents says (Section 897):

> "Any person who participates in any wrongful appropriation of the invention becomes thereby a violator of the rights protected by the patent. Such participation may be direct or indirect; *it is sufficient if it promotes in any degree* the unauthorized manufacture, use or sale of the invention."

IV.

It is immaterial that the Pacific Coast Casualty Company may have had no actual knowledge that the pavement contracted for constituted any infringement. The Pacific Coast Casualty Company must have known that it made itself liable for the construction of "Hassam Pavement," as the following facts will show:

The Consolidated Contract Company's proposal to the City of Portland specified "Hassam pavement, per sq. yd. $1.75, total $23,272.90," which is by far the one big and important item in the bid which totaled $26,610.49 (Record, Vol. I, p. 29). This proposal was embodied in the contract as the "items of material and work" (Record, Vol. I, p. 28) and the Pacific Coast Casualty Company's bond guarantees that the Consolidated Contract Company will "perform all the work embraced by said Contract" (Record, Vol. I, p. 34). Not only was it thus called by name but the very infringing specifications were set forth in Ordinances 21,172 and 22,941 of the City of Portland (Record,

Vol. I, pp. 23, 24), which were referred to in the contract and the bond (Record, Vol. I, pp. 24 and 34) and in the Resolution No. 3031 of the Council of the City of Portland (Record, Vol. I, p. 22), the resolution for the improvements in question, the construction called for is described as "Hassam Pavement" and this resolution was the basis for the ordinances referred to. In any event, the Pacific Coast Casualty Company cannot claim forgiveness because it knew not what it did.

"The intention with which an act of infringement is performed is immaterial." Robinson on Patents, Section 901 and the cases cited therein.

All persons are bound to take notice of a patent duly issued.

> *Nat. Car Brake Shoe Co.* vs. *Terre Haute Car & Manufacturing Co.,* 19 Fed. 514 at 520.

Furthermore, the Consolidated Contract Company expressly admits notice of infringement (Record, Vol. I, p. 56) and the Pacific Coast Casualty Company admits it by failing to deny, which, by itself, is conclusive of this matter.

V.

The third point under Part I of the Petition for Rehearing and Part II thereof, because of their obvious weakness, are not deemed to require comment by the appellees.

It therefore appears that no substanial or valid reasons for reopening this cause have been or can be offered and that the Petition for Rehearing should be denied.

Respectfully submitted,

LOUIS W. SOUTHGATE,
CAREY & KERR,

Solicitors for Appellees.